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PHILIP BELL BOOTH & ANOR v. NAVARATNAM NARAYANAN

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
DAVID WONG DAK WAH JCA
B UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: B-02-434-03-2014]
25 AUGUST 2016

C ***CONTRACT:*** *Agreement – Breach – Allegation of – Whether there was valid contract between parties – Whether there was consensus ad idem to form concluded contract – Correspondence between parties showed counter offers and rejection of offers – Whether there was conclusion to any offer or acceptance – Elements to prove existence of contract – Whether fulfilled by parties – Whether there was binding contract – Contracts Act 1950, s. 2(a)*

D ***CONTRACT:*** *Agreement – Concluded contract – Whether there was consensus ad idem – Whether there was valid contract between parties – Correspondence between parties showed counter offers and rejection of offers – Whether there was conclusion to any offer or acceptance – Elements to prove existence of contract – Whether fulfilled by parties – Whether there was binding contract – Contracts Act 1950,* E *s. 2(a)*

The first appellant, together with one Terry O' Boyle, a director of the second appellant, was attempting to secure a project to construct an aquarium known as 'Aquaria' in the building of Kuala Lumpur Convention Centre ('KLCC'). The first appellant requested the respondent to assist the first and F second appellant to meet the key high personnel of KLCC with the aim to cinch the project. The first appellant promised the respondent that if the respondent was to assist the second appellant to ensure that an agreement could be concluded between the first appellant and the party managing KLCC to build the project aquarium 'Aquaria' in the building of KLCC, the G second appellant would award a 5% shareholding owned by the second appellant in Aquawalk Sdn Bhd ('the third defendant') to the respondent as consideration for the respondent's assistance and efforts. Subsequently, the respondent introduced the first appellant to Ralph Marshall, the CEO of KLCC and a meeting was held between the respondent and the first appellant H together with the key KLCC personnel towards discussing a concluded contract between the second appellant and KLCC for the Aquaria project. An agreement was concluded and entered into between the third defendant and KLCC where a lease agreement for a period of 24 years was concluded. Under the lease agreement, the appellants and the third defendant were to I build and run an 'Aquaria' marine project in the said KLCC building. It was the respondent's case that the respondent had fulfilled the said agreement and discharged his duties under the said agreement. Therefore, he ought to be

paid accordingly either in shares or in cash amounting to a 5 % shareholding in the third defendant. The respondent then requested the first and second appellants to transfer the ownership of 5% shareholding in the third defendant into his name but the first and second appellants refused to do so. The respondent commenced this suit alleging that the appellants had breached the agreement. The respondent sought for a declaration including an order that the appellants perform all acts necessary for the transfer of the 5% shares owned by the second appellant in the third defendant to the respondent and general damages. The High Court found that although there was no formal written agreement, however, from various meetings as well as contemporaneous documents, the existence of a valid contract between parties was undeniable. The High Court held that there was *consensus ad idem* between the parties to form a concluded contract and entered judgment for the respondent. The crux of the appellants' appeal herein against the said decision was whether there was a concluded contract between the appellants and the respondent.

Held (allowing appeal with costs)
Per Umi Kalthum Abdul Majid JCA (for the majority):

(1) To prove the existence of a contract between the parties, the elements of contract (the offer, acceptance, intention to create legal relation, consideration, certainty and capacity) must be fulfilled by the parties. It is trite to prove that there is a contract existing between the parties. The respondent must prove that there was an offer made as clearly stated under s. 2(a) of the Contracts Act 1950. (para 50)

(2) The appellants at the initial stage did offer to provide 5% shares of the initial paid up capital of the third defendant for the mere introduction to Ralph Marshall. As it turned out, such introduction was not material to the third defendant entering into a lease agreement with KLCC. From the correspondence between the parties, every time when the first appellant made an offer to the respondent, the respondent rejected the offer and/or put up another counter-offer. There was no conclusion to any offer or acceptance relating to any introduction made by the respondent. The High Court Judge had erred in concluding that there was a *consensus ad idem* on the precise percentage of equity to be granted when the respondent had clearly rejected or had counter offered the offer made by the first appellant. Therefore, there could be no concluded binding contract between the parties. (paras 44 & 51)

(3) The High Court Judge had clearly erred in deciding that there was a concluded contract between the parties and also erred in deciding that the first appellant had revived the offer which was then accepted by the respondent leading to a concluded contract between the parties when there was no acceptance by the respondent at all material times. (para 54)

Per David Wong Dak Wah (dissenting):

(1) From the correspondences of e-mail between the parties, the High Court Judge concluded that the respondent had accepted the first appellant's offer of 5% of equity in the third defendant as consideration of his shares and that the respondent had offered to sell his 5% equity in the third defendant at USD750,000. In other words, there was a concluded agreement as to the 5% shareholding in the third defendant as the consideration of his service of introduction but no concluded agreement as to the value of the aforesaid 5% should the appellant wish to cash out from the third defendant. (paras 22 & 23)

(2) The High Court Judge was perfectly correct in her conclusion. There was in fact no dispute that the respondent had performed his part of introducing the appropriate personnel in KLCC to secure the Aquaria project. There was no dispute also that the respondent was to be rewarded for his services. The High Court Judge had given ample judicial appreciation of the totality of the evidence in the context of the pleadings. It was definitely not a decision which was perverse or not supported by established evidence. It was also not a decision which no reasonable tribunal would not have concluded. (paras 24 & 28)

Bahasa Malaysia *Headnotes*

Perayu pertama, bersama dengan seorang bernama Terry O' Boyle, pengarah perayu kedua, cuba mendapatkan projek untuk membina sebuah akuarium dikenali sebagai 'Aquaria' di bangunan Kuala Lumpur Convention Centre ('KLCC'). Perayu pertama telah meminta responden menolong perayu pertama dan kedua untuk mengaturkan perjumpaan dengan kakitangan tinggi utama KLCC dengan tujuan untuk mendapatkan projek tersebut. Perayu pertama berjanji dengan responden bahawa jika responden dapat membantu perayu kedua untuk memastikan satu persetujuan boleh dimuktamadkan di antara perayu pertama dan pihak yang menguruskan KLCC untuk membina projek akuarium 'Aquaria' dalam bangunan KLCC, perayu kedua akan mengawardkan 5% saham milik perayu kedua dalam Aquawalk Sdn Bhd ('defendan ketiga') kepada responden sebagai balasan bantuan dan usaha responden. Kemudiannya, responden memperkenalkan perayu pertama kepada Ralph Marshall, CEO KLCC dan satu mesyuarat telah diadakan di antara responden dan perayu pertama bersama-sama dengan kakitangan utama KLCC untuk membincangkan kontrak termaktub di antara perayu kedua dan KLCC untuk projek Aquaria. Satu perjanjian dimuktamadkan dan dimeterai di antara defendan ketiga dan KLCC di mana perjanjian pajakan untuk tempoh 24 tahun dimaktubkan. Di bawah perjanjian pajakan, perayu-perayu dan defendan ketiga akan membina dan menjalankan projek marin 'Aquaria' dalam bangunan KLCC tersebut. Adalah kes responden bahawa responden telah memenuhi perjanjian tersebut dan telah menjalankan tugas-tugasnya di bawah perjanjian tersebut. Oleh itu, dia harus dibayar sama ada

dalam bentuk saham atau bentuk wang berjumlah 5% pegangan saham dalam defendan ketiga. Responden kemudiannya meminta perayu pertama dan kedua untuk memindahkan pemilikan saham 5% dalam defendan ketiga ke atas namanya tetapi perayu pertama dan kedua enggan berbuat demikian. Responden memulakan guaman ini dengan dakwaan bahawa perayu-perayu melanggar perjanjian dan responden menuntut deklarasi termasuk satu perintah supaya perayu-perayu melakukan segala tindakan yang diperlukan bagi pemindahan 5% saham milik perayu kedua dalam defendan ketiga kepada responden serta ganti rugi am. Mahkamah Tinggi mendapati walaupun tiada perjanjian bertulis rasmi, tetapi dari pelbagai mesyuarat serta dokumen semasa, kewujudan kontrak sah di antara pihak-pihak terlibat tidak dapat dinafikan. Mahkamah Tinggi memutuskan bahawa terdapat *consensus ad idem* di antara pihak-pihak terlibat untuk membentukkan kontrak termaktub dan memasukkan penghakiman memihak kepada responden. Asas rayuan perayu-perayu terhadap keputusan tersebut adalah sama ada terdapat kontrak termaktub di antara perayu-perayu dan responden.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Umi Kalthum Abdul Majid HMR (keputusan majoriti):

(1) Untuk membuktikan kewujudan kontrak di antara pihak-pihak terlibat, elemen-elemen kontrak (tawaran, penerimaan, niat untuk mewujudkan perhubungan mengikut undang-undang, balasan, kepastian dan kapasiti) harus dipenuhi oleh pihak-pihak terlibat. Adalah matan untuk membuktikan terdapat kontrak yang wujud di antara pihak-pihak. Responden harus membuktikan bahawa tawaran telah dibuat seperti yang jelas dinyatakan di bawah s. 2(a) Akta Kontrak 1950.

(2) Perayu-perayu pada peringkat awal menawarkan pemberian 5% saham dari modal berbayar awal defendan ketiga semata-mata untuk pengenalan dengan Ralph Marshall. Ternyata, pengenalan itu tidak material kepada defendan ketiga memasuki perjanjian pajakan dengan KLCC. Dari surat menyurat antara pihak-pihak terlibat, setiap kali perayu pertama membuat tawaran kepada responden, responden akan menolak tawaran itu dan/atau mengemukakan satu tawaran balas. Tiada kesimpulan dibuat untuk tawaran dan penerimaan berhubungan dengan apa-apa pengenalan yang dibuat oleh responden. Hakim Mahkamah Tinggi khilaf apabila membuat kesimpulan bahawa terdapat *consensus ad idem* berkenaan peratusan ekuiti tepat yang diberikan apabila responden telah dengan jelasnya menolak atau menawar balas tawaran yang dibuat oleh perayu pertama. Oleh itu, tiada kontrak termaktub yang mengikat di antara pihak-pihak.

(3) Hakim Mahkamah Tinggi dengan jelasnya khilaf apabila memutuskan bahawa terdapat kontrak termaktub di antara pihak-pihak dan juga silap apabila memutuskan bahawa perayu pertama telah menghidupkan

A semula tawaran itu yang kemudiannya diterima oleh responden yang membawa kepada kontrak termaktub di antara pihak-pihak apabila tiada penerimaan oleh responden pada setiap waktu material.

Oleh David Wong Dak Wah HMR (menentang):

B **(1)** Dari surat menyurat e-mail antara pihak-pihak terlibat, Hakim Mahkamah Tinggi telah membuat kesimpulan bahawa responden telah menerima tawaran perayu pertama 5% saham ekuiti dalam defendan ketiga sebagai balasan saham-sahamnya dan responden telah membuat tawaran untuk menjual 5% ekuiti dalam defendan ketiga pada USD750,000. Dalam erti kata lain, terdapat kontrak termaktub C berkenaan 5% pemegangan saham dalam defendan ketiga sebagai balasan perkhidmatan pengenalan tetapi tiada perjanjian termaktub berkenaan nilai 5% tersebut sekiranya perayu ingin tunai keluar daripada defendan ketiga.

D **(2)** Hakim Mahkamah Tinggi betul dalam kesimpulannya. Tidak dipertikaikan bahawa responden telah melaksanakan tugasnya apabila memperkenalkan kakitangan KLCC yang berkenaan untuk memperoleh projek Aquaria. Tidak dipertikaikan bahawa responden perlu diberi ganjaran untuk perkhidmatannya. Hakim Mahkamah Tinggi telah memberikan pertimbangan kehakiman mencukupi ke atas keseluruhan E keterangan dalam konteks pliding. Ia pasti bukan satu keputusan yang sesat atau tidak disokong oleh keterangan mantap. Ia juga bukan keputusan yang mana tiada tribunal munasabah tidak akan mencapai.

Case(s) referred to:

F *Affin Bank Bhd v. Mohd Kasim Ibrahim [2013] 1 CLJ 465 FC* ***(refd)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises [1994] 3 CLJ 133 SC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

G *The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor [1998] 2 CLJ 486 FC* ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 2(a), (b), 7(b)

For the appellants - Gideon Tan, N Sivaraj & Neo Chi Chyn; M/s Gideon Tan Razali Zaini

H *For the respondent - Norliza Rasool Khan & Bryan Teo; M/s Zul Rafique & Partners*

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: 22-512-2003 (overruled)]

Reported by Suhainah Wahiduddin

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JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This is an appeal against the decision of the High Court dated 28 October 2013 in allowing the plaintiff/respondent's claim against the defendants/appellants for fees amounting to 5% shareholdings in the third defendant (Aquawalk Sdn Bhd) for service rendered.

[2] On 14 May 2015 we heard the appeal, and by a majority, the appeal was allowed and the High Court's decision was set aside with no order as to costs.

[3] I have dissented with the majority and dismissed the appeal and now give my grounds of decision.

Background Facts

[4] In an attempt to secure a project to construct the largest aquarium in Malaysia in the building of the Kuala Lumpur Convention Centre (KLCC), the first appellant in early 2002 approached the respondent to assist him and the second appellant to arrange a meeting with the key decision makers of KLCC.

[5] The aquarium project's intention is to showcase the ecological system and marine life of Malaysia and also with the purpose of educating all visitors to the same.

[6] The consideration or reward for the respondent's service of putting the first appellant with the right people at KLCC and securing the envisaged project, as alleged by the respondent, is 5% shareholdings in the third defendant which is owned by the second appellant.

[7] It is undisputed that on 18 April 2002, the first appellant through the introduction of the respondent met Ralph Marshall who was the CEO of KLCC. Some four days later on 22 April 2002, a meeting was held between the respondent, first appellant and the key decision makers of KLCC for the purpose of concluding the aquarium project between the second appellant and KLCC.

[8] It is also undisputed that an agreement was concluded between KLCC and the third defendant where the third defendant was granted a 24 year lease to build and run the aquarium project known as "Aquaria".

[9] Premised on the conclusion of the agreement between the third defendant and KLCC, the respondent took out this suit to enforce the promise made by the first and second appellants to give to the respondent 5% shareholdings in the third defendant.

A **High Court's Decision**

[10] The learned judge in my view had correctly stated what the issue was before her and that is "whether there is a concluded contract between the respondent and the first and second appellants in respect of the transfer of 5% shareholdings in the third defendant as consideration for the respondent's
B rendered services".

[11] The learned judge after taking into consideration the totality of evidence tendered in court concluded that there was a "*consensus ad idem*" between the parties in that the first and second appellants had offered the respondent a consideration of 5% equity in the third defendant for his
C services of introduction and that offer had been accepted by respondent. The offer and acceptance thereof, in the learned judge's view, gave rise to a concluded agreement between the appellants and the respondent.

Grounds Of Decision

D **[12]** It is settled law that an appellate court should not intervene with a trial court decision unless the decision is premised on a wrong application of a principle of law or the decision is clearly unsupported by the evidence before the court.

E **[13]** The Federal Court in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 puts it this way at p. 800:

> [26] Thus, the prime issue in respect of Questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court
F is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt or Thomas v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

G **[14]** In the recent case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 the Federal Court on appellate interference said as follows:

> It is trite that an appellate court would be slow to disturb a trial court's findings of facts in the absence of any perverse and unwarranted finding on the totality of the evidence before it. The cases of *Tan Sri Khoo Teck*
H *Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146; [1993] 1 MLJ 113; *Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 and *Lim Kim Chet & Anor v. Multar Masngud* [1984] 2 CLJ 77; [1984] 1 CLJ (Rep) 23; [1984] 2 MLJ 165 are some of the authorities to support the cardinal principle that an appellate court should be slow in interfering with a finding of fact of the trial court which had
I observed the demeanour and heard the witnesses before coming to its conclusion. In the present appeal, it has not been successfully shown to

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> us that the findings of the High Court is against the weight of evidence or perverse in any way. The judgment of the High Court does not contain any serious error warranting appellate interference.

[15] Applying the principles stated above, the question which I need to consider is simply whether the decision of the learned judge is perverse or/ and unsupported by evidence. Having read the grounds of decision of the learned judge in the context of the totality of evidence, it is my considered view that there is a complete absence of perversity in the decision of the learned judge. It is also my view that the decision is a reasoned one fully supported by established evidence. I shall now give my reasons for my views.

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[16] The principle of contractual law applicable in this appeal is a simple one and that is whether there has been an offer by the appellants and acceptance by the respondent with consideration resulting in a binding agreement between the parties. The learned judge was fully aware of the applicable legal principle and that can be seen when she relied on the case of *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises* [1994] 3 CLJ 133 where the then Supreme Court held that for there to be a concluded agreement there must be a 'meeting of minds' between the contracting parties. Hence on this score there is no error on the part of the learned judge.

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[17] Learned counsel for the appellant in his meticulous submission set out the chronology of events and premised on the exchanged emails and meetings between parties submits that there could not have been any concluded agreement. The crucial email relied on by learned counsel is the one dated 9 November 2002 which states as follows:

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> I hereby write to confirm that you have agreed in principle to sell and assign all the rights as you **may have in respect to Aquawalk Sdn Bhd** including the option to purchase the five (5%) percent shares in Aquawalk Sdn Bhd ("option") granted to you .." (emphasis by learned counsel)

[18] Premised on that email, learned counsel submits that the first appellant only acknowledged a possibility that the respondent may have the initial paid up of 5% and the first appellant then offered USD$75,000 for that possible right. And when that offer was countered with a value of USD750,000 by the respondent, it is submitted that there could not be any concluded agreement.

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[19] The learned judge examined the events in two parts. She had found and in my view correctly that the events prior to 15 October 2002 did not result in a concluded agreement. The reason is that on 11 June 2002, the respondent had rejected the offer of 5% shareholdings in the third defendant as opposed to the request of 25% shareholding in the third defendant by the respondent.

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[20] The next part of her analysis of events starts from an email dated 15 October 2002 where the first appellant made another offer which reads as follows:

> Joey,
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> Further to our meeting [you, me and Terry O'Boyle] at 3 pm in the Mandarin Oriental Hotel, KL last Saturday [12th October] I wish to confirm the following regarding issue of shares to you in recognition of the introduction role that you played in connecting us to which the enabled us to present this [Aqua Walk International Limited's] opportunity to the head of KLCC Holdings and KLCC management ... namely:
>
> Joey Navaratnam is to be awarded 5% of the shares [free carry] in Aqua Walk Sdn Bhd when and at the same time as the first investors are issued shares and under the same conditions, including "Embargo", that will apply ... those conditions have yet to be drafted by Aqua Walk International's lawyers and will be sent to you when ready.
>
> I confirm my earlier advice that that expected time for share documentation is anticipated to be about January/February next year.

[21] The learned judge found that this email represents a new offer by the first appellant. In response to that offer, the respondent on 18 October 2002 replied as follows:

> Just arrived today. Got your email. You did not comply to my terms.
>
> 1. My terms was to cash out USD750,000.00 for the services as mentioned equivalent to 5% of shares.
> 2. However you are going to transfer 5% of shares when the first investor moves in sometime in Jan or Feb 2003.
> 3. You also said there would not be any investor until completion. I am confused which is correct.

[22] The learned judge from the two emails concluded that:

(i) the respondent had accepted the first appellant's offer of 5% of equity in the third defendant as consideration of his shares;

(ii) the respondent had offered to sell his 5% equity in the third defendant at USD750,000.

[23] In other words, there was a concluded agreement as to the 5% shareholding in the third defendant as the consideration for his service of introduction but no concluded agreement as to the value of the aforesaid 5% should the appellant wishes to cash out from the third defendant.

[24] In my view the learned judge was perfectly correct in her conclusion. There is in fact no dispute that the respondent had performed his part of introducing the appropriate personnel in KLCC to secure the Aquaria

project. There is no dispute also that the respondent is to be rewarded for his services. What has become contentious is the consideration for the services rewarded.

[25] In my view, there is no dispute at all. This can be gathered from the documentary and oral evidence in court. In cross-examination, the first appellant (DW1) states as follows:

Q : Alright but when he did the introduction, he has to be paid 5% free carry shares. You agreed earlier?

A : Yes page 40.

Q : Thereafter, if he brings in investors, he can then subscribe to further shares. You agreed to that too right?

A : Yes …

...

Q : I'm coming to that Mr Booth. I'm coming to that. Let's now look at page 70. Sorry, Mr Booth can we please go to page 67. Sorry. Now this is your email to Mr Joey Navaratnam, the Plaintiff dated 15 October 2002. Do you agree?

A : Yes.

Q : And here you confirm that there was a meeting that Mandarin Oriental Hotel on the 12 of October. Can you confirm that?

A : Yes.

Q : And at this meeting, and which now you put down in your email, you also confirm that the Plaintiff will receive 5% shares free carry in Aquawalk Sdn Bhd, Do you agree?

A : Yes.

Q : And you also say that he is also bringing in outside investors.

A : Yes.

These testimonies make it quite clear that there are two matters between the parties. The first matter is the 5% shares consideration for the respondent's introduction to personnel in KLCC and the second matter refers to the respondent bringing in investors in the third defendant and the consideration for introduction of investors.

[26] I am in full agreement with learned counsel for the respondent in that what the appellant is attempting to do is to say that because of there was no agreement as to the consideration for introducing investors in the third defendant, the 5% shareholding introduction consideration agreement had also been superseded by the non-agreement for the consideration of the investors introduction exercise to be undertaken by the respondent.

[27] The appellants' stand is in fact contrary to their own pleadings as pointed out by the learned judge. This is what she said:

> There was never any dispute raised by the 1st and 2nd Defendant in the pleadings or contemporaneous documents or in oral testimonies that the Plaintiff was not offered the 5% equity in the 3rd Defendant. This was made clear in the Defendant's emails of 9.6.2002, 15.10.2002 as well as the 1st Defendant's letter of 9.11.2002. The defence raised in the pleadings is that the offer had been extinguished by the Plaintiff's counter offer and the absence of any further offers by the 1st and 2nd Defendants. While it is true that the 1st Defendant's offer had been extinguished by the Plaintiff's counter offer of 11.6.2002, subsequent events (as mentioned above) demonstrate that the 1st Defendant had revived the offer which was then accepted by the Plaintiff leading to a concluded contract between the parties.

Conclusion

[28] One can easily glean from the grounds of the learned judge that she had given ample judicial appreciation of the totality of the evidence in the context of the pleadings. It is definitely not a decision which is perverse or not supported by established evidence. It is also not a decision which no reasonable tribunal would not have concluded.

[29] Accordingly I affirmed the decision of the High Court and dismissed the appeal with costs in the sum of RM20,000 to the respondent. I also ordered that the deposit be refunded to the appellants.

Umi Kalthum Abdul Majid JCA:

[30] This is an appeal from a decision of the High Court on 21 February 2014 after a full trial wherein the respondent's claim against the appellants was allowed with costs. Before us, my learned brother Datuk Hishamuddin Mohd Yunus and I by majority decided to allow this appeal by the respondent, whilst my learned brother Datuk David Wong decided to dismiss this appeal.

Facts

[31] In or about the year 2000, the first appellant, together with one Terry O'Boyle, a director of the second appellant, was attempting to secure a project to construct an Aquarium known as: "Aquaria" in the building of Kuala Lumpur Convention Centre (KLCC) which would be the largest Aquarium Exhibitions in Malaysia. The said Aquarium Project ("Aquaria") would have a "discovery zone" that would promote the ecological system and marine life in Malaysia which would educate visitors about the ecological aspects, natural life, marine lives and the environment.

[32] In or about early 2002, the first appellant informed the respondent of his attempts to secure the project and requested the respondent to assist the first and/or second appellant to meet key high personnel of KLCC with the aim to clinch the project. The first appellant promised the respondent that if the respondent was to assist the second appellant to ensure that an agreement could be concluded between the first appellant and the party managing KLCC to build project Aquarium "Aquaria" in the building of KLCC the second appellant would award a 5% shareholding owned by the second appellant in Aquawalk Sdn Bhd ("the third defendant") to the respondent as consideration for the respondent's assistance and efforts.

[33] On 18 April 2002, the respondent introduced the first appellant to Ralph Marshall who was the CEO of KLCC and on 22 April 2002, a meeting was held between the respondent and the first appellant together with the key KLCC personnel towards discussing to conclude a contract between the second appellant and the KLCC for the Aquaria project. An agreement was concluded and entered into between the third defendant and KLCC where a lease agreement for a period of 24 years was concluded. Under the lease agreement the appellants and the third defendant were to build and run an "Aquaria" marine project in the said KLCC building.

[34] This development was published in "The Star" and "New Straits Times" newspapers which stated clearly that the Project Aquarium "Aquaria" was expected to be opened in the year of 2005.

[35] It was the respondent's case that the respondent had fulfilled the said agreement and discharged his duties under the said agreement. Therefore he ought to be paid accordingly either in shares or in cash amounting to a 5% shareholding in the third defendant.

[36] The respondent then requested the first and second appellants to transfer the ownership of 5% shareholding in the third defendant into his name but the first and second appellants refused to do so.

[37] The respondent commenced this suit alleging that the appellants had breached the agreement and the respondent claimed for declaration including an order that the appellants perform all acts necessary for the transfer of the 5% shares owned by the second appellant in the third defendant to the respondent and general damages. In the alternative, the plaintiff claimed for the total value of the said 5% shares on the date of opening of the said "Aquaria" and costs.

The High Court's Decision

[38] The High Court on 21 February 2014 entered judgment for the respondent in respect of para. 20(a) and (b) of the amended statement of claim and ordered general damages to the respondent to be assessed by the Senior Assistant Registrar. The learned trial judge found that there was a *consensus*

ad idem between parties to form a concluded contract. Although there was no formal written agreement, however, from various meetings as well as contemporaneous documents, the existence of a valid contract between parties was undeniable.

[39] The learned trial judge made that finding based on the exchange of e-mails between the first appellant dated 15 October 2002 and the respondent dated 18 October 2002 which is now reproduced below:

First appellant's email to the respondent dated 15 October 2002

> Joey,
>
> further to our meeting [you, me and Terry O' Boyle] at 3pm in the Mandarin Oriental Hotel, KL last Saturday [12th October] I wish to confirm the following regarding issue of shares to you in recognition of the introduction role that you played in connecting to us which then enabled us to present this [Aqua Walk International Limited's] opportunity to the head of KLCC Holdings and KLCC Management … namely:
>
> Joey Navaratnam is to be awarded 5% of the shares [free carry] in Aqua Walk Sdn Bhd when and at the same time as the first outside investors are issued shares and under the same conditions, including "Embargo", that will apply … those conditions have yet to be drafted by Aqua Walk International's lawyers and will be sent to you when ready.
>
> I confirm my earlier advice that the expected time for share documentation is anticipated to be about January/February next year.

The respondent's response dated 18 October 2002 to the first appellant's email

> Just arrived today. Got your e-mail. You did not comply to my terms.
>
> 1. My terms was to cash out USD 750,000 for the services as mentioned equivalent to 5% of shares.
> 2. However you are going to transfer 5% of shares when the first investor moves in sometime in Jan or Feb 2003.
> 3. You also said there would not be any investor until completion. I'm confused which is correct.

[40] The appellants now appeal to this court.

The Appeal

[41] The crux of the appeal was on the issue whether there was a concluded contract between the appellants and the respondent. The learned trial judge concluded that on the totality of evidence, there was a "*consensus ad idem*" between parties in this case. We found that the learned trial judge had erred in Her Ladyship's finding which was made based on insufficient appreciation of evidence (see *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785).

[42] Learned counsel for the appellants submitted that there was no *consensus ad idem* between the appellants and the respondent. The first appellant made numerous offers to the respondent regarding the 5% shares of the initial paid up capital of the third defendant. It was the appellants' contention that these offers made were never accepted by the respondent at all material times.

[43] The appellant referred to s. 2(b) of the Contracts Act 1950 which provides that where the promisee signifies his assent to the proposal, this is an acceptance of the proposal and a proposal when accepted, becomes a promise and s. 7(b) of the Contracts Act 1950 provides that the acceptance must be conveyed or expressed in some usual and reasonable manner unless the proposal prescribes the matter in which it is to be accepted.

[44] The appellants submitted that there was no concluded agreement between the respondent and the first appellant at the meeting on 6 November 2002 for the following reasons.

(i) at all material times, there was no concluded agreement relating to award of 5% shares. The appellants at the initial stage did offer to provide 5% shares of the initial paid up capital of the third defendant for the mere introduction to Mr Ralph Marshall. As it turned out such introduction was not material to the third defendant entering into a lease agreement with KLCC.

(ii) by looking at the chronology of events, there was no conclusion to any offer or acceptance relating to any introduction made by the respondent. Several offers were made by the first appellant to the respondent, but there was no acceptance to these offers. The chronology of events as clearly laid down by the appellants' counsel in his submission is as follows:

(a) on 9 June 2002, the first appellant offered to give the plaintiff 5% shares in his email to the respondent (see p. 213 Jilid 2(2), AR). However, the respondent in his email dated 11 June 2002 (see p. 214 Jilid 2(2), AR) rejected such offer by saying that he was looking at a minimum 25% equity as the number of people involved were too large and requested the first appellant to consider his allocation of shares. Therefore, there was no concluded agreement at this point in time. Bearing in mind that this was the respondent's case who pleaded in his statement of claim that there was a concluded contract between the parties at this juncture. However, the respondent himself confirmed that there was no concluded agreement on 6 November 2002 during the cross-examination as follows (see p. 92, Jilid 2(1), AR):

> GT : So we then move forward to page 47 … This would be 18th July 2002. And Mr. Navaratnam, following your evidence in your witness statement, you've

A

> already given evidence that there is no concluded agreement until 6th November 2002. Am I correct? This is your evidence? Question 14 and your answer. So at this juncture, even after page 40, page 41 in Bundle B, there is no concluded agreement. That is your evidence, would that be correct?

B

PW1 : Yes.

(b) the respondent then on 18 July 2002 (see letter dated 18 July 2002, p. 220, Jilid 2(2), A.R.), made a counter offer to Aquawalk International Limited to buy shares in third defendant. Mr Terry C O'Boyle then tendered to the respondent a draft share sale agreement drawn by the solicitors in terms of the respondent's counter offer. However, the respondent failed to reply within the offer period even though several reminders were sent to him. There was no concluded agreement (see pp. 221, 226-227, 232, 233, 236, 238, 288-289, Jilid 2(2), Jilid 2(3), AR); D

(c) thereafter, the first appellant and Mr Terry O' Boyle had a meeting with the respondent on 12 October 2002. After the said meeting, the first appellant *via* his email on 15 October 2002 (see p. 240, Jilid 2(2), AR and as partly quoted above) again offered 5% shares of the E initial paid up capital in the third defendant to the respondent. However, such offer was again rejected by the respondent in his email dated 18 October 2002 (see p. 241, Jilid 2(2), AR and as partly quoted above). The respondent in his said email clearly stated that the first appellant did not comply with his terms whereby his terms were "to cash out USD$750,000 for the services as mentioned F equivalent to 5% shares";

(d) thereafter, the first appellant then had one more meeting on 6 November 2002 with the respondent where the respondent claimed that the agreement was concluded at this meeting. However, G the first appellant then wrote a very specific offer to the respondent on 9 November 2002 even though the first appellant did not accept he had done anything to contribute to the 5% shares of the initial paid up capital. The first appellant in his offer to the plaintiff specifically stated as follows (see p. 243, Jilid 2(2), AR):

H

> I hereby write to confirm that you have agreed in principle to sell and assign all the rights as you may have in respect to Aquawalk Sdn Bhd including the option to purchase the five (5%) percent shares in Aquawalk Sdn Bhd ("Option") granted to you ...

I

It was stated very clearly by the first appellant in his offer that he only acknowledged a possibility that the respondent may have the initial paid up of 5% and the first appellant then offered USD$75,000 for that possible right. However, it was again rejected

by the respondent in his letter dated 10 November 2002 (see p. 244, Jilid 2(2), AR) by saying that the 5% shares actually worth USD$750,000 and hence he was not accepting and agreeing to the terms and condition set out in the first appellant's letter dated 9 November 2002. Here again, there was no concluded agreement.

[45] The respondent in response submitted that there was an agreement of minds between the parties for the respondent to be awarded the 5% shares. There was a valid agreement with the first and second appellants and the respondent whereupon the respondent was entitled to the 5% free carry shares of the second appellant in the third defendant when the respondent fulfilled his obligation under the agreement.

[46] The respondent contended that the correspondence showed that there were two different deals between the respondent and the appellants. The two deals were as follows:

(a) remuneration for securing the Aquaria project. The respondent was to be remunerated a 5% shareholding for introducing the first and second appellants to the relevant parties in order for the Aquaria Project to succeed; and

(b) remuneration for investor introduction. The respondent was to be offered a further 10% shareholding over and above the 5% share holding with a lower entry point if the respondent managed to bring in investors for the Aquaria Project.

[47] The respondent further submitted that respondent accepted that 5% shares which was awarded to him for introducing the first and second appellants to the relevant parties of KLCC. In addition, DW1 during cross-examination admitted that the first defendant had requested the respondent to look for other investors to invest in the Aquaria Project (see pp. 121-122, Jilid 2(1), AR).

NRK: You don't agree? Now, but do you agree that besides the introduction, you had also asked the Plaintiff to assist in finding investors for Aquawalk?

DW1: Yes among other people.

NRK: So you was one of those who...

DW1: Yes

NRK: And of course, if he did find those investors, he would be remunerated for that?

DW1: Yes

NRK: And do you agree that he was to be allowed to subscribe to shares at the cheaper price for that introduction? Sorry, for the investors he brought in?

DW1: Could you repeat it again?

NRK: Remuneration for the investors that he brought in, would be in the forms of subscription of shares at the cheaper rate. Do you agree?

DW1: Yes.

Further, during trial, DW1 again gave the same answer with regards to the 5% shares for the introduction and remuneration for investors brought in for the Aquaria Project.

[48] The respondent denied the first and second appellants' contention that the offer of 5% shares was superseded by an email at p. 214 and p. 220 of AR Vol 2 (2) by submitting that the initial offer of 5% was accepted by the respondent and PW1 gave evidence as follows during cross-examination (see p. 94, lines 342-352, Jilid 2(1), AR):

GT : There is a verbal agreement? Would you not agree with me that that purported verbal agreement is not reflected in this letter?

PW1 : It's reflected in page 40.

GT : Would you not agree with me that what is reflected on page 40 has been superseded by page 41 and now page 47?

PW1 : 41 and page 47 are two separate issues, one we're talking about 5% free carry shares, and another subject here is for facilitating that they are giving me a cheaper entry for a subject to buy-in shares. So there is two separate issues here. One is a free-carry shares, for facilitating the whole deal, and over and above, there is a cheaper entry point for me to buy-in 10% equity. So there is two separate issues that you are mixing it up.

[49] The respondent submitted that the respondent's email dated 11 June 2002 (p. 214, Jilid 2 (2), AR) was a reply to the second deal and not to the first deal. In any event, the respondent accepted the learned High Court Judge's correct decision that there was unequivocally a valid agreement between the respondent and the appellants. The respondent further submitted that the appellants failed to disprove the respondent's case and failed to make out their defence that there was no concluded agreement as the offer was superseded by a counter-offer. As such, the learned High Court Judge was right in deciding that the first and second appellants made a subsequent offer to award 5% equity of the third defendant to the respondent which was accepted by the respondent. It was undisputed fact that the respondent had completed his services and had done all his obligations under the agreement. This was apparent from the admitted fact that an agreement was entered between the third defendant with relevant parties of the KLCC for the Aquaria Project. The appellants did not plead nor contend that the respondent did not do the necessary for the 5% equity shares. As such the learned High Court Judge was right in deciding that the first appellant and second appellants must honour their duties and obligations by transferring the 5% free carry shares to the respondent.

[50] In coming to our majority decision, we did not accept the respondent's argument that at all material time there was a concluded contract between the appellants and the respondent. It is trite law to prove the existence of a contract between the parties, the elements of contract (the offer, acceptance, intention to create legal relation, consideration, certainty and capacity) must be fulfilled by the parties. It is trite that to prove there is a contract existing between the parties, the respondent must first prove that there is an offer made. It is clearly stated under s. 2(a) of the Contracts Act 1950.

[51] We found that from the correspondence between the parties, and as clearly set out by the appellants' counsel as the chronology of events in para. 15(ii) above, every time when the first appellant made an offer to the respondent, the respondent rejected the offer and/or put up another counter-offer. Based on these correspondences, we found the learned High Court Judge had erred in concluding that there was a *consensus ad idem* on the precise percentage of equity to be granted when the respondent had clearly rejected or had counter-offered the offer made by the first appellant. Therefore, there could be no concluded binding contract between the parties.

[52] The Federal Court in the case of *The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor* [1998] 2 CLJ 486 Mohamed Dzaiddin FCJ (as he then was) at p. 507, in delivering the judgment of the court had quoted from *Chitty on Contracts* and held as follows:

> "… an acceptance is a final an unqualified expression of assent to the terms of the offer". But, where the reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter-offer which the original offeror can accept or reject.

[53] The Federal Court adopted the case above and also held in the case of *Affin Bank Bhd v. Mohd Kasim Ibrahim* [2013] 1 CLJ 465 at p. 491 as follows:

> The facts of this case show that the respondent had been firm and unyielding on his stand that his retirement age should be 60 and not 55. When the appellant offered him a new contract of employment on 26 March 2005, which in clear terms stated his retirement age to be at 55, he accepted it under protest. This under protest qualification nullified his consent, if any. It means that there had been no *consensus ad idem* on the terms of employment, now on offer, notably on the shortened retirement age. It represents a qualified acceptance, not a valid one. Section 7 of the Contracts Act 1950 requires an acceptance, to be valid, to be absolute and unqualified. The insistence by the respondent that his retirement age be 60 and not 55 as now offered is tantamount to a counter offer and a rejection of the original offer (*OTM Ltd v. Hydranautic* [1981] 2 Lloyd's Resp 211). This principle is endorsed by the Federal Court in *The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor* [1998] 2 CLJ 486 …

[54] Therefore, by looking at the documents and the evidence produced in this case, the respondent clearly could not prove that there was a concluded agreement between the parties on 6 November 2002 as pleaded. Numerous offers were made by the first appellant to the respondent but from the chronology of events set out above, it was clear that each and every time when the offers were made, the respondent rejected the offers which could be clearly seen in the correspondence between the parties. Therefore there was no concluded agreement as alleged by the respondent. The learned High Court Judge had clearly erred in deciding that there was a concluded contract between the parties and also erred in deciding that the first appellant had revived the offer which was then accepted by the respondent leading to a concluded contract between the parties when there was no acceptance by the respondent at all material times.

Conclusion

[55] For the reasons stated above, we found there were merits in the appellant's appeal. We therefore by a majority allowed the appeal with costs of RM40,000 to the appellants here and below. We set aside the order of the High Court. Deposit was refunded.